Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

AMERICAN PRESIDENT LINES, LTD.,
and AMERICAN PRESIDENT COMPANIES, LTD.,
Petitioners,

v.

GAMMA-10 PLASTICS, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a dispute between a shipper and a carrier concerning lost or damaged cargo, may the carrier rely on the provisions of a federal statute explicitly incorporated into the bill of lading and the tariff?

LIST OF PARTIES

All parties to the proceeding in the court of appeals appear in the caption of the case.

American President Companies, Ltd. is the parent corporation of American President Lines, Ltd., a wholly owned subsidiary. American President Companies, Ltd. has an interest in the following subsidiaries and affiliates:

- American Consolidation Services, Ltd.
- American President Trucking Company, Ltd.
- APL Information Services, Ltd.
- APL Land Transport Services, Inc.
- Eagle Marine Services, Ltd.
- Natomas Real Estate Company

The stock of American President Companies, Ltd. is listed on the New York and Pacific Stock Exchanges.

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Petitioners,

v.

GAMMA-10 PLASTICS, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Petitioners, American President Lines, Ltd., and American President Companies, Ltd., respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, reprinted as Appendix A ("App. A") at page A-1, is officially reported at 32 F.3d 1244 (8th Cir. 1994).

The district court's Order and Memorandum Opinion filed July 20, 1992, reprinted as App. B at B-1, is unreported. The district court's Judgment Order filed July 19, 1993, reprinted as App. C at C-1, is unreported. The district court's Order and Opinion filed December 17, 1993, reprinted as App. D at D-1, is reported at 839 F. Supp. 1359 (D. Minn. 1993).

JURISDICTION

Petitioners seek review of the judgment of the Court of Appeals for the Eighth Circuit, which was dated and entered on August 10, 1994. A timely petition for rehearing was filed on September 8, 1994, and denied on October 6, 1994. *See* App. E at E-1. This petition for certiorari was filed within ninety days of that date, and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Carriage of Goods by Sea Act § 3(6), 46 U.S.C. app. § 1303(6) (fourth paragraph):

> In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered . . . .

Shipping Act of 1984, § 8(a)(1), 46 U.S.C. app. § 1707(a)(1):

> . . . [E]ach common carrier and conference shall file with the [Federal Maritime] Commission, and keep open to public inspection, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. . . . Tariffs shall—
>
> . . .
>
> (E) include sample copies of any loyalty contract, bill of lading, contract of affreightment, or other document evidencing the transportation agreement.

STATEMENT

Petitioner American President Companies, Ltd., is the parent company of petitioner American President Lines, Ltd. ("APL"), a Delaware corporation doing business as a multimodal carrier. The respondent is a Minnesota corporation that sold plastic resin pellets. In the summer of 1988, the respondent contracted with APL for the transportation of containers of plastic resin from Atlanta to cities in China. Between July and October, 1988, the respondent shipped twenty-two containers with APL in four separate shipments. The present controversy involves the losses that the respondent claims to have suffered as a result of APL's alleged mishandling of this cargo.

APL's standard-form bill of lading, which evidences the contract of carriage for each of these shipments, includes a typical "clause paramount."[1] This clause extends the application of the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. app. §§ 1300-15, beyond the time when it applies as a matter of law (*i.e.*, while the goods are on board the vessel) to include the period before loading and after discharge. (During this period, the Harter Act, 46 U.S.C. app. §§ 190-196, would otherwise apply.) In particular, the clause paramount extends the fourth para-

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[1] The "clause paramount" in APL's standard-form bill of lading provides:

> CLAUSE PARAMOUNT. The receipt, custody, carriage and delivery of the Goods are governed by the provisions of the transportation agreement evidenced hereby and incorporated by this reference, including . . . (iii) the provisions of the U.S. Carriage of Goods by Sea Act, 1936, ("COGSA"). . . . Such Act . . . shall be extended to apply . . . before the Goods are loaded on and after they are discharged from the Vessel, and throughout the entire time during which the Carrier is responsible for the Goods under the transportation agreement.

graph of section 3(6) of COGSA, 46 U.S.C. app. § 1303(6), to the period before loading and after discharge. This paragraph provides that a carrier, such as APL, "shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered."

To avoid any misunderstanding, clause 24 of the bill of lading made the same point explicitly:

> TIME FOR SUIT. The Carrier and the Vessel shall be discharged from all liability in contract and in tort in respect of loss, damage, delay, misdelivery or conversion unless suit is brought within one year after delivery of the Goods or the date when the Goods should have been delivered.

The entire bill of lading, including these two provisions, was also on file with the Federal Maritime Commission as part of APL's tariff, as required by section 8(a)(1)(E) of the Shipping Act, 46 U.S.C. app. § 1707(a)(1)(E).

The first shipment under this arrangement arrived at its destination in China on September 9, 1988, but the respondent's customers did not collect the cargo until various times in late 1988 and early 1989. The second shipment arrived in Hong Kong on September 24, 1988, and was held there pending instructions from the respondent; it was finally delivered in Shanghai in November 1988. On instructions from the respondent, APL held the third and fourth shipments in Hong Kong and California, respectively. But for the respondent's instructions to hold these two shipments, all of the cargo should have been delivered in China long before July 1989.

The respondent filed the present action in a Minnesota state court on July 2, 1990, well over a year after the cargo was or should have been delivered. APL removed

the case to federal court under 28 U.S.C. § 1441, the district court having jurisdiction under 28 U.S.C. § 1332. After removal, APL pled several affirmative defenses, including that the action was time-barred under the one-year time-for-suit provisions of COGSA section 3(6) and clause 24 of the bills of lading.

The district court, granting respondent's motion for partial summary judgment, struck APL's time-bar defense. *See* App. B at B-1. It held that the case was governed by the Harter Act, which does not contain a statutory time-for-suit provision. Although section 7 of COGSA, 46 U.S.C. app. § 1307, permits the extension of COGSA to the post-discharge period, the court concluded that the clause paramount was ineffective to do so here because the bills of lading had not been delivered to the respondent until after the goods had been shipped. *See* App. B at B-6. The court implicitly held that clause 24 (which is permissible under the Harter Act) was ineffective for the same reason. Finally, the court followed *Allstate Insurance Co. v. International Shipping Corp.*, 703 F.2d 497 (11th Cir. 1983), to hold that APL could not rely on the tariff as a source of constructive notice. *See* App. B at B-5.

A jury awarded the respondent $500,000 in damages for delay of and damage to the cargo and awarded the petitioners $12,769.98 for unpaid freight on the first shipment. The district court entered judgment on this verdict. *See* App. C at C-1. In post-trial proceedings, the court awarded the respondent pre-judgment interest of $308,417. *See* 839 F. Supp. at 1364; App. D at D-11. Both parties appealed.

The court of appeals affirmed in part and reversed in part. In ruling on APL's time-bar defense, it employed the so-called "fair opportunity" doctrine, which several courts have applied to carriers' attempts to limit their liability to $500 per package under section 4(5) of COGSA, 46 U.S.C.

app. § 1304(5). *See* 32 F.3d at 1250-54; App. A at A-10 to A-19. The court decided that APL had satisfied this doctrine with respect to the first shipment because APL was able to prove that the respondent had received an original bill of lading and negotiated it to a bank two days after the containers had been loaded on the container train in Atlanta. *See* 32 F.3d at 1253-54; App. A at A-17 to A-18. As the respondent was thus bound by the clause paramount and the time-for-suit provision, the complaint should have been dismissed with respect to the first shipment. With respect to the other shipments, however, APL had not proven when the respondent had received the bill of lading, and therefore did not satisfy the fair opportunity doctrine. *See* 32 F.3d at 1254; App. A at A-18 to A-19. Accordingly, APL was unable to rely on the clause paramount or the time-for-suit provision. The court of appeals also agreed with *Allstate* to conclude that APL could not rely on the tariff to prove constructive notice of the application of COGSA or the time-for-suit provision. *See* 32 F.3d at 1254; App. A at A-19. APL's entitlement to the benefit of the one-year time-for-suit provisions with respect to these last three shipments is the focus of the present petition.

REASONS FOR GRANTING THE PETITION

The true issue in this case is whether a business can rely on reasonable provisions in its standard-form contract when it enters into a commercial transaction. The court below believed that a multi-million dollar company active in international trade was too unsophisticated to read a tariff, remember the provisions of a standard-form bill of lading that it had accepted in a previous transaction, or otherwise discover the contractual terms under which its cargo (with an invoice value in the hundreds of thousands of dollars) was being carried half-way around the world. Unfortunately, some other courts of appeals have adopted a similar approach. Accordingly, carriers are faced with a variety of judicial inventions, such as the so-called "fair opportunity" doctrine, that preclude their reliance on bill of lading provisions, on tariff provisions, and even on federal statutes unless they can prove that the other party to the contract received some particular form of notice.[2] Not all courts of appeals have followed the same approach, however, so the industry also faces a variety of conflicting interpretations involving these doctrines and the governing federal statutes. These conflicts breed wasteful litigation, make insurance more difficult and expensive to

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[2] The current situation is somewhat surprising, for this Court has held that cruise lines can rely on the provisions of a standard-form passenger ticket with no more notice than that provided by "three pages of fine print." *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 590 (1991); *see also id.* at 593. This Court has also held that an air carrier does not lose the benefit of its limitations if it fails to provide the notice specifically required by the applicable international agreement. *See Chan v. Korean Air Lines*, 490 U.S. 122 (1989). It is hard to believe that an international commercial trader, such as the respondent, should be entitled to a higher degree of protection than cruise line and airline passengers.

obtain, and interfere with the efficient structuring of transactions.

There is no dispute that one year is a reasonable time in which to require suit to be brought. Congress explicitly adopted a one-year time-for-suit provision in COGSA section 3(6), this provision undoubtedly governed these transactions during the time that the goods were on board vessels, and the Eighth Circuit applied the provision to the first shipment. Nor is there any dispute that the contract between the parties can extend COGSA's application to the post-discharge period—as it did for the first shipment. The only dispute before the Court is whether APL can rely on the bill of lading's clause paramount that so extends COGSA, or on a clause that explicitly provides a one-year time-for-suit provision substantially identical to COGSA section 3(6), for the last three shipments. On this issue, the decision below is in conflict with decisions of other courts of appeals on several levels, at least two of which are worthy of this Court's attention. First, the Eighth Circuit, along with the Eleventh Circuit, is in conflict with decisions in the First and Fifth Circuits on the effect of a valid tariff provision. Second, the Eighth Circuit is now part of an eight-circuit split on the application of the fair opportunity doctrine.

THE COURTS OF APPEALS ARE IN CONFLICT ON THE FORCE OF VALID TARIFF PROVISIONS

This Court has long recognized that " 'tariffs bind both carriers and shippers with the force of law.' " *Crancer v. Lowden*, 315 U.S. 631, 635 (1942) (quoting *Lowden v. Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939)); *cf. Security Services, Inc. v. Kmart Corp.*, 114 S. Ct. 1702, 1706 (1994) (the shipper is bound to pay the tariff rate notwithstanding ignorance or misquotation);

Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 120-121 (1990) (same). Indeed, there is no dispute that shippers such as the respondent are bound by the *rates* that a carrier such as APL files in a tariff. The courts below, however, held that the respondent was not bound by the *terms and conditions* that APL filed as part of its tariff—that the respondent could bring suit more than "one year after delivery of the goods or the date when the goods should have been delivered," despite the express prohibition in the filed tariff.

Distinguishing rates from terms and conditions has never found any favor in the decisions of this Court. *Cf. Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 417-421 (1959) (upholding an exculpatory clause filed in the tariff). In making this distinction, the courts below instead followed *Allstate Insurance Co. v. International Shipping Corp.*, 703 F.2d 497, 500 (11th Cir. 1983), which also held that a carrier could not rely on a one-year time-for-suit provision that had been included in the carrier's filed tariff. The Eleventh Circuit implicitly held that a shipper is bound by only that portion of the tariff that involves the carrier's rates or charges.

The Eighth and Eleventh Circuit approach is in conflict with decisions of the First and Fifth Circuits. In *Insurance Co. of North America v. Puerto Rico Marine Management, Inc.*, 768 F.2d 470 (1st Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986), the court permitted a carrier to rely on a one-year time-for-suit provision under circumstances that were essentially the same as those in *Allstate* (and the present case). In the process, the court specifically considered the Eleventh Circuit's reasoning and rejected it. *See* 768 F.2d at 477-478. The First Circuit concluded that the *Allstate* court had erred in failing to recognize that the carrier

before it (like APL) was required to file not only its rates but also the terms and conditions of the contract of carriage. This conflict does not involve merely inconsistent dicta or disagreements about general principle. The courts of appeals, including the court below, are reaching results that are directly contrary to those that other courts of appeals have reached in the same situations.

The Eighth and Eleventh Circuits are also in conflict with decisions of the Fifth Circuit. In several cases, the Fifth Circuit has permitted a carrier to rely on the terms and conditions of the contract of carriage (in particular, a provision based on section 4(5) of COGSA that limits the carrier's liability to $500 per package) in part because of the binding nature of the tariff. As the court explained in *Brown & Root, Inc. v. M/V Peisander*, 648 F.2d 415, 421 (5th Cir. 1981), "a tariff validly filed is not a mere contract but is the law promulgating the applicable standard." *See also Gebr. Bellmer Kg. v. Terminal Services Houston, Inc.*, 711 F.2d 622 (5th Cir. 1983) (per curiam); *Wuerttembergische & Badische Versicherungs-Aktiengesellschaft v. M/V Stuttgart Express*, 711 F.2d 621 (5th Cir. 1983) (per curiam).

The clear and direct conflict between the First Circuit and the Eleventh Circuit may originally have been unworthy of this Court's attention. Quite simply, the Eleventh Circuit erred in its interpretation of the prior caselaw. The subsequent First Circuit decision clearly and convincingly exposes the error and demonstrates the proper analysis. This Court's decisions point in the same direction. Until last August, therefore, the Eleventh Circuit's error might justifiably have been ignored as an aberration that was unlikely to cause serious problems. Now that the Eighth Circuit has reviewed the conflict, however, and agreed with the Eleventh Circuit's erroneous conclusion

despite the First Circuit's well-reasoned analysis, the conflict can no longer be dismissed so quickly. It is now clear that the Eleventh Circuit's mistake will have wider influence, and this Court should step in to correct the problem before it becomes any worse.

The Eighth and Eleventh Circuits' mistake goes far beyond erroneous legal analysis; the decision below imposes an intolerable burden on the shipping industry. Under the precedent established in this case, a carrier can no longer rely on the standard terms contained in its bill of lading and filed as part of its tariff unless it can prove the circumstances of the shipper's acceptance of the bill of lading. As a practical matter, a carrier will need to negotiate every contract individually with each shipper before it can be sure of the terms under which it operates. Rather than placing the minimal burden on shippers of checking the tariff (which is, after all, the entire point of requiring carriers to file tariffs), the courts below have placed a far heavier burden on carriers—and have done so with no legal justification.

The inability to rely on standard-form contracts would be a heavy burden for any large-scale business with a high volume of relatively inexpensive transactions, but it is particularly onerous when bills of lading are involved because carriers frequently have little control over when they issue a bill of lading. For example, shippers customarily demand "on board" bills of lading (generally to satisfy letter of credit requirements), so a carrier is typically unable to issue the bill of lading until the goods have been loaded on the vessel—which may be well after the carrier took control of the goods. Similarly, shippers frequently demand "freight prepaid" bills of lading (again because letters of credit often require them), and the carrier is unable to comply until the shipper has paid the

freight charges. Indeed, in the present case APL was unable to issue bills of lading in the second and third shipments until the respondent paid the freight charges. But under the Eighth Circuit's analysis, APL lost the benefit of its standard-form contract because of the respondent's failure to make timely payment!

THE COURTS OF APPEALS ARE IN CONFLICT ON THE FAIR OPPORTUNITY DOCTRINE

The significance of filing a tariff resurfaces in the context of the so-called "fair opportunity" doctrine. This doctrine imposes a judicially-created requirement that a carrier must satisfy before it can rely on statutory rights under COGSA or contractual rights granted by the bill of lading.[3] If a carrier does not give a shipper sufficient

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[3] COGSA applies as a matter of law only between the time the goods are loaded on the vessel and the time they are discharged from the vessel. *See generally* 2A BENEDICT ON ADMIRALTY §§ 41-44 (7th ed. 1994). Most bills of lading, however, contain a clause paramount extending COGSA's application to periods that would otherwise be governed by the Harter Act. *See, e.g.,* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 148 (2d ed. 1975). For cases (such as the present) in which COGSA does not apply as a matter of law during the relevant period, therefore, a carrier's rights are either purely contractual (under a bill of lading provision such as clause 24) or a combination of statutory and contractual (under a clause paramount contractually extending the application of COGSA). Because "a high proportion of cargo damage occurs" during loading and unloading, 2A BENEDICT ON ADMIRALTY § 169, at 16-45 (7th ed. 1994), cargo cases commonly arise in situations where the Harter Act would generally apply. Accordingly, many "fair opportunity" cases fall into this statutory/contractual pattern. *See, e.g., Mori Seiki USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 446 (9th Cir. 1993) (cargo was damaged after unloading); *Caterpillar Overseas, S.A. v. Marine Transport Inc.*, 900 F.2d 714, 717 (4th Cir. 1990) (during inland transportation before loading); *Carman Tool & Abra-*

(continued...)

notice to satisfy the fair opportunity requirement, most U.S. courts hold that it may not rely on the statutory or contractual right at issue. This has generally been the right to limit liability to $500 per package, *see* COGSA § 4(5), 46 U.S.C. app. § 1304(5), but here the Eighth Circuit extended the doctrine to govern the one-year time-for-suit provision of section 3(6), 46 U.S.C. app. § 1303(6). The doctrine itself is highly questionable, and when it does apply there is a conflict among the circuits on whether filing a tariff provides sufficient notice to satisfy its requirements.

Courts of appeals in eight circuits have addressed the fair opportunity doctrine, and at least five distinct approaches have emerged. Most recently, the First Circuit addressed the issue in *Henley Drilling Co. v. William H. McGee & Co.*, 36 F.3d. 143 (1st Cir. 1994). Both parties in *Henley Drilling* assumed that the doctrine applied, but the court nevertheless "refrain[ed] from embracing the 'fair

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[3] (...continued)

sives v. Evergreen Lines, 871 F.2d 897, 899 (9th Cir. 1989) (after unloading); *Gebr. Bellmer Kg. v. Terminal Services Houston, Inc.*, 711 F.2d 622, 624 (5th Cir. 1983) (per curiam) (after unloading); *Brown & Root, Inc. v. M/V Peisander*, 648 F.2d 415, 417 (5th Cir. 1981) (before loading); *Toshiba International Corp. v. M/V "Sea-Land Express,"* 841 F. Supp. 123, 125 (S.D.N.Y. 1994) (during inland transportation after unloading).

Other "fair opportunity" cases also fall into this statutory/contractual pattern because they involve cargo in domestic trade or cargo carried on deck—two other situations in which COGSA does not apply as a matter of law. *See, e.g., Institute of London Underwriters v. Sea-Land Service, Inc.*, 881 F.2d 761, 763 (9th Cir. 1989) (deck cargo); *Mu, Inc. v. Puerto Rico Maritime Shipping Authority*, 1988 AMC 347 (4th Cir. 1987) (domestic trade); *Pan American World Airways v. California Stevedore & Ballast Co.*, 559 F.2d 1173, 1175 n.3 (9th Cir. 1977) (per curiam) (domestic trade); *Z.K. Marine, Inc. v. M/V Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992) (deck cargo).

opportunity' doctrine . . . in any form" because it found the doctrine's existence "to be a problematic question" that need not be resolved in a situation where the carrier had met whatever requirements might plausibly be imposed. *See* 36 F.3d at 146 n.5. We take the view that there is no legitimate basis for the doctrine, and the First Circuit was correct to question its existence. Ideally, the Court should take this opportunity to correct the errors that the lower courts have made and bring U.S. law into line with the rest of the world's maritime nations. *See infra* at 19, 24 (discussing the international conflict on the issue). Alternatively, the Court could use this case as a vehicle to resolve a long-standing and well-recognized intercircuit conflict. But even if the Court prefers to focus on the tariff issue without directly addressing the fair opportunity doctrine, a ruling on the tariff question would play a significant role in minimizing this intercircuit conflict as well.

The lower courts that have accepted the doctrine are in hopeless conflict on how to apply it. The Ninth Circuit has, until now, applied the strictest version, requiring the bill of lading to recite the substance of the COGSA provision on which the carrier seeks to rely. *See Nemeth v. General S.S. Corp.*, 694 F.2d 609, 611-612 (9th Cir. 1982); *Komatsu, Ltd. v. States S.S. Co.*, 674 F.2d 806, 809-811 (9th Cir. 1982); *Pan American World Airways v. California Stevedore & Ballast Co.*, 559 F.2d 1173, 1175-77 (9th Cir. 1977) (per curiam); *see also Travelers Indemnity Co. v. Vessel Sam Houston*, 26 F.3d 895, 898 (9th Cir. 1994) (summarizing the law of the circuit); *Mori Seiki USA, Inc. v. M.V. Alligator Triumph*, 990 F.2d 444, 448-449 (9th Cir. 1993) (same); *Institute of London Underwriters v. Sea-Land Service, Inc.*, 881 F.2d 761, 766 (9th Cir. 1989) (same); *Carman Tool & Abrasives v. Evergreen Lines*, 871 F.2d 897, 899 & n.3 (9th Cir. 1989) (same); *Tessler*

Brothers (B.C.) v. Italpacific Line, 494 F.2d 438, 443 (9th Cir. 1974) (establishing the law of the circuit).

The Fifth Circuit, explicitly rejecting this standard in a case involving a bill of lading substantially identical to the one before the Ninth Circuit in *Pan American*, holds that the statutory language need not be in the bill of lading so long as appropriate disclosure is provided by the carrier's tariff. *See Brown & Root*, *supra*, 648 F.2d at 419-25; *see also Couthino, Caro & Co. v. M/V Sava*, 849 F.2d 166, 168-171 (5th Cir. 1988) (summarizing the law of the circuit); *Gebr. Bellmer Kg.*, *supra*, 711 F.2d at 624 (same); *Wuerttembergische*, *supra*, 711 F.2d at 622 (same). The Eleventh Circuit has accepted this analysis in the "fair opportunity" context. *See Insurance Co. of North America v. M/V Ocean Lynx*, 901 F.2d 934, 939-941 (11th Cir. 1990), *cert. denied*, 498 U.S. 1025 (1991).

In the Second Circuit, it appears that a clause paramount alone will satisfy the fair opportunity requirement. *See General Electric Co. v. M/V Nedlloyd*, 817 F.2d 1022, 1029 (2d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988); *Binladen BSB Landscaping v. M.V. "Nedlloyd Rotterdam,"* 759 F.2d 1006, 1017 n.12 (2d Cir.), *cert. denied*, 474 U.S. 902 (1985); *see also Union Carbide Corp. v. M/V Michele*, 764 F. Supp. 783, 786 (S.D.N.Y. 1990) (summarizing the law of the circuit); *E.M.S. Industrie S.A. v. Polskie Towarzystwo Okretowe*, 608 F. Supp. 1133, 1134-35 (E.D.N.Y. 1985) (same).

The Fourth Circuit has been similarly willing to recognize incorporation by reference, holding that a "short form" bill of lading satisfies the doctrine's requirements when it incorporates COGSA and the long form bill of lading by reference (and the long form bill of lading contains the statutory language). *See Cincinnati Milacron, Ltd. v. M/V American Legend*, 804 F.2d 837 (4th Cir.

1986) (en banc) (per curiam); *see also Pearson v. Leif Hoegh & Co.*, 1992 AMC 1025, 1029-32 (4th Cir. 1992) (per curiam) (relying on bill of lading clauses and the tariff); *Caterpillar Overseas, S.A. v. Marine Transport Inc.*, 900 F.2d 714, 719-720 (4th Cir. 1990) (relying on clauses in the standard-form bill of lading that would have been issued if the cargo had not been damaged before loading); *Aetna Insurance Co. v. M/V LASH Italia*, 858 F.2d 190, 193-194 (4th Cir. 1988) (relying on bill of lading clauses and the tariff); *Mu, Inc. v. Puerto Rico Maritime Shipping Authority*, 1988 AMC 347, 349-350 (4th Cir. 1987) (same). The Sixth Circuit seems to have adopted the same approach, albeit in circumstances that would have satisfied a more demanding standard. *See Acwoo International Steel Corp. v. Toko Kaiun Kaish, Ltd.*, 840 F.2d 1284, 1288-89 (6th Cir. 1988).

Even before the decision below and before the First Circuit questioned the doctrine's existence in *Henley Drilling*, several lower courts[4] and numerous commentators[5] had

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[4] *See, e.g., Carman Tool, supra*, 871 F.2d at 899 n.3 ("the courts are divided"); *Couthino, Caro & Co., supra*, 849 F.2d at 169 ("courts have different views"); *Cincinnati Milacron, Ltd. v. M/V American Legend*, 784 F.2d 1161, 1164 (4th Cir.) ("circuits . . . are in conflict"), *superseded* 804 F.2d 837 (4th Cir. 1986) (en banc) (per curiam); *E.M.S. Industrie, supra*, 608 F. Supp. at 1135 ("federal circuits are in conflict").

[5] *See, e.g.*, 2A BENEDICT ON ADMIRALTY § 166, at 16-24 to -30 (7th ed. 1994); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 9-36, at 375-376 (1987); Richard W. Palmer & Frank P. DeGiulio, *Terminal Operations and Multimodal Carriage: History and Prognosis*, 64 TUL. L. REV. 281, 352 (1989) ("There is a split among the circuits"); JoAnne Zawitoski, *Federal, State, and International Regulation of Marine Terminal Operators in the United States*, 64 TUL. L. REV. 439, 457-458 (1989) (discussing the conflict); Jonathan Rodriguez-Atkatz, *Apportionment of Risk in Vessel and Marine Terminal Contracts*, 64 TUL. L. REV. 497,

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recognized the square conflict among the circuits on this issue. Indeed, at least two commentators had explicitly called on this Court to resolve the conflict. *See* Daniel A. Tadros, *COGSA Section 4(5)'s "Fair Opportunity" Requirement: U.S. Circuit Court Conflict and Lack of International Uniformity; Will the United States Supreme Court Ever Provide Guidance?*, 17 TUL. MAR. L.J. 17, 34-36 (1992); Michael F. Sturley, *Observations on the Supreme Court's Certiorari Jurisdiction in Intercircuit Conflict Cases*, 67 TEXAS L. REV. 1251, 1265-66, 1273 & nn.143-144 (1989).

By questioning the doctrine's very existence, the First Circuit has widened this long-standing conflict in one direction. The decision below widens it in the other direction, for in this case APL satisfied the standards that have been imposed in every other circuit. APL's bill of lading includes a clause paramount and clause 24 recites the substance of section 3(6) of COGSA, thus satisfying the Ninth Circuit standard. APL's tariff provides adequate notice, thus satisfying the fair opportunity standard of the Fifth and Eleventh Circuits. The clause paramount meets

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[5] (...continued)
510 (1989) ("courts . . . have applied varying standards"); Thomas R. Denniston, Carter T. Gunn & Alfred E. Yudes, Jr., *Liabilities of Multimodal Operators and Parties Other Than Carriers and Shippers*, 64 TUL. L. REV. 517, 523 (1989) ("circuit courts differ in their interpretation of what constitutes a fair opportunity"); JoAnne Zawitoski, *Limitation of Liability for Stevedores and Terminal Operators Under the Carrier's Bill of Lading and COGSA*, 16 J. MAR. L. & COM. 337, 355-360 (1985) (discussing the conflict); Nicholas J. Healy & Jerome Scowcroft, *Admiralty and Shipping*, 1984 ANN. SURVEY AM. L. SUPP. 1, 22-24 (same); Mary T. Reilly, *COGSA $500 Package Limitation: Shipper's Opportunity to Declare a Higher Value*, 13 J. MAR. L. & COM. 245, 250-252 (1982) (same); Laurence B. Alexander, Comment, *Containerization, the Per Package Limitation, and the Concept of "Fair Opportunity,"* 11 MAR. LAW. 123, 134-135 (1986) (same).

the standard of the Second, Fourth, and Sixth Circuits. And any one of these facts satisfies the standard of the First Circuit—if the First Circuit even recognizes the doctrine. But the Eighth Circuit now holds that a carrier must go beyond all of this and prove when the shipper received the bill of lading and what the shipper did with it.

Once again, there is a clear and direct conflict in which the courts of appeals, including the court below, are reaching results that are directly contrary to those that other courts of appeals have reached in the same situations—indeed, with respect to the same standard-form bill of lading. The conflict is not inadvertent. The Fifth and Ninth Circuits have explicitly acknowledged their refusal to follow each other's position. *See, e.g., Brown & Root, supra*, 648 F.2d at 423-424 (declining to follow *Pan American, supra*); *Carman Tool, supra*, 871 F.2d at 899 n.3 (recognizing the disagreement with the Fifth Circuit). The First Circuit carefully reviewed the field before taking its unique position. *See Henley Drilling, supra*, 36 F.3d at 145. This is not a conflict on which further percolation would be valuable. The lower courts have been addressing the doctrine in the COGSA context for over twenty years, *see Tessler Brothers, supra*, 494 F.2d at 443, and in the process have fully discussed a wide range of possibilities. The Ninth Circuit alone has addressed the doctrine in at least eight published opinions, and the Fourth Circuit has already taken the issue *en banc* (with at least four more appellate decisions applying the *en banc* ruling!). Scholarly commentary has also addressed the doctrine in great detail. *See, e.g.*, Michael F. Sturley, *The Fair Opportunity Requirement Under COGSA Section 4(5): A Case Study in the Misinterpretation of the Carriage of Goods by Sea Act*, 19 J. MAR. L. & COM. 1 (1988). Finally, it is unrealistic to expect the lower courts to resolve the conflict without this Court's intervention. The circuits are simply moving

further apart, as can be seen from the two most recent decisions on the doctrine (*i.e.*, the decision below and *Henley Drilling, supra*, in the First Circuit).

Bad as this intercircuit conflict is, the situation becomes even worse when one recognizes that COGSA is the U.S. enactment of an international treaty popularly known as the "Hague Rules."[6] The treaty was intended, as its official name suggests, to unify the law relating to bills of lading, but there is a direct international conflict on the "fair opportunity" doctrine. Although over ninety countries have adopted the convention, no foreign court has adopted this peculiarly American doctrine. *See, e.g.*, Sturley, *The Fair Opportunity Requirement*, *supra*, 19 J. MAR. L. & COM. at 22-24; Tadros, *supra*, 17 TUL. MAR. L.J. at 34. Furthermore, the Supreme Court of Canada—our largest trading partner—rejected the suggestion that a carrier should be subject to anything resembling the U.S. doctrine. *See Anticosti Shipping Co. v. St-Amand*, 1959 S.C.R. 372, 374-377, 19 D.L.R.2d 472, 473-475, 1959 AMC 1526, 1527-29 (Can.).

We urge this Court to bring U.S. law into line with the rest of the world's maritime nations by rejecting the doctrine entirely. *See generally* Sturley, *The Fair Opportunity Requirement*, *supra*. Alternatively, we ask the Court to resolve the intercircuit conflict and hold that APL satisfied the doctrine's requirements, either by filing a tariff that fully disclosed the provisions on which it now seeks

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[6] Brussels Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Aug. 25, 1924, 51 Stat. 233, T.S. No. 931, 120 L.N.T.S. 155. *See generally* 2A BENEDICT ON ADMIRALTY § 15 (7th ed. 1994) (summarizing the history of COGSA); GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 143-144 (2d ed. 1975) (same).

to rely or by including the clause paramount and the time-for-suit provision in its standard-form bill of lading.

THE IMPORTANCE OF RESOLVING THE CONFLICTS

The importance of the issues raised here is not limited to the maritime context. Standard-form contracts are a normal part of business throughout the world, and the validity of their terms is important to virtually every business and consumer in the country. Filed tariffs play a role in the carriage of goods and passengers by land, air, and water, and thus they have an impact on everyone who travels and on every business and consumer who purchases goods that have been transported.

Even if we limit our focus to the carriage of goods by sea, the issues here are worthy of the Court's attention. Each year, hundreds of billions of dollars worth of cargo are carried to and from the United States by sea. *See* Sturley, *The Fair Opportunity Requirement*, *supra*, 19 J. MAR. L. & COM. at 2 & n.4. With the recent approval of GATT, such trade is likely to increase. Most of this business is automatically subject to COGSA during the period that the cargo is on board a vessel. But the governing standards before loading and after discharge (when "a high proportion of cargo damage occurs," *see* note 3, *supra*), as well as for certain situations in which COGSA does not necessarily apply by its terms, are determined by the provisions of the bill of lading and the tariff. Cases such as the present, which establish the legal rules that will govern the relationship between carriers and ship-

pers,[7] go to the very heart of this multi-billion dollar industry.

Not only are the issues important, but conflicts in this field are particularly intolerable because litigants can easily exploit them through forum-shopping. A cargo owner may bring an *in rem* action in admiralty in any district in which a vessel is located, regardless of whether the forum has any other connection with a case. *See* 15 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3817, at 170 (2d ed. 1986). Similarly, the cargo owner may bring an *in personam* action, either in admiralty or at law, wherever it can serve process on the defendant or attach its property. *See id.*, § 3817, at 170-171 & nn.8-9. In the present case, for example, the respondent was able to bring an action against APL in the District of Minnesota because APL maintains an office there. The four shipments, however, originated in Georgia and went overland to the West Coast to begin their trans-Pacific journey. But if the respondent had filed suit in a court in the Eleventh

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[7] In fact, the range of interests affected is much broader than just carriers and shippers, for a number of other parties in a typical transaction derive their rights from the original parties to the bill of lading. Under a "Himalaya clause" (which is included in most bills of lading), stevedores, terminal operators, inland carriers, and other third parties can obtain the benefit of the carrier's limitations and exclusions. *See* 2A BENEDICT ON ADMIRALTY § 169 (7th ed. 1994). Thus if the carrier loses its statutory or bill of lading rights, the stevedore suffers as well. *See, e.g., Pan American, supra*, 559 F.2d at 1175. Similarly, the rights of third parties such as consignees and subrogated insurers are determined by the shipper's rights. *See, e.g., Carman Tool, supra*, 871 F.2d at 900-901 (consignee); *Insurance Co. of North America v. Puerto Rico Marine Management, supra*, 768 F.2d at 473 (insurer). *See generally Stolt Tank Containers, Inc. v. Evergreen Marine Corp.*, 962 F.2d 276, 279 (2d Cir. 1992) (noting the importance of third parties' being able to rely on the terms of the bill of lading).

Circuit (where the goods were shipped), the Ninth Circuit (where the ocean voyages began), Hong Kong (where goods were transshipped), or China (the ultimate destination), the result would likely have been very different.[8]

Furthermore, this is a subject where uniformity is particularly important. *See, e.g., Robert C. Herd & Co. v. Krawill Machinery Corp.*, 359 U.S. 297, 301 (1959); GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY 191-192 (2d ed. 1975). By its very nature, the carriage of goods by sea is a multi-jurisdiction enterprise. Everyone involved in a commercial maritime transaction must know how the law will allocate possible losses so that they can decide who must insure (or make provision for self-insurance), and how much the insurance should cost. When the rules differ according to the forum, multiple parties face a potential loss depending on where the case is heard. As a result, each party must insure against the loss and there is a needless "double insurance" expense.

Conflicting legal standards also force the parties to do their best to comply with the standard in each jurisdiction in which they are subject to suit. Even when this is possible, the expense must ultimately be passed on to the consumers who purchase the transported goods. For a carrier such as APL, these expenses could be staggering: APL has approximately 65 offices in the United States (including at least one office in each federal circuit) and 115 overseas offices in 40 different foreign countries. Its ships regularly call at 55 different ports and, through its multimodal operations, it provides service to approximately 400 for-

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[8] Although the courts below followed the Eleventh Circuit on the tariff issue, the Eighth Circuit's fair opportunity analysis is in conflict with Eleventh Circuit doctrine.

eign cities. Complying with a different legal standard in each jurisdiction would impose a significant burden on a carrier's ability to function efficiently, and consumers would be the ultimate losers. This is particularly true when the burden imposed is as unreasonable as that announced by the Eighth Circuit in this case, which seriously undermines a carrier's ability to rely on a standard-form contract.

Congress was particularly conscious of the need for uniform law in this field when it enacted COGSA. *See generally* Sturley, *Observations*, *supra*, 67 TEXAS L. REV. at 1271. During the floor debates, the principal reason given for the statute was the need to implement the international treaty to achieve uniformity in the law governing ocean bills of lading. *See*, *e.g.*, 79 CONG. REC. 13341 (1935) (statement of Sen. White) ("The [COGSA] bill is designed to bring about uniformity in ocean bills of lading."), *reprinted in* 1 THE LEGISLATIVE HISTORY OF THE CARRIAGE OF GOODS BY SEA ACT AND THE *TRAVAUX PRÉPARATOIRES* OF THE HAGUE RULES 589 (1990); *id.* at 8954 (statement of Sen. Thomas) ("[The COGSA bill] is simply to bring about uniform usage of bills of lading in the transshipment of goods and makes the usage uniform."), *reprinted in* 1 LEGISLATIVE HISTORY at 587. The committee reports in both houses claim uniformity as the bill's most important purpose. *See*, *e.g.*, S. REP. NO. 742, 74th Cong., 1st Sess. 4 (1935), *reprinted in* 1 LEGISLATIVE HISTORY at 534 (bill "will accomplish real uniformity"); H.R. REP. NO. 2218, 74th Cong., 2d Sess. 6 (1936), *reprinted in* 1 LEGISLATIVE HISTORY at 526 ("most outstanding benefits are simplification and uniformity of bills of lading"). Conflicting interpretations on the applicability of COGSA under a clause paramount and a tariff not only interfere with the effective operation of a federal statute, they undermine the principal Congressional purpose in enacting the

statute. The Court's recent decision to grant certiorari in No. 94-623, *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*[9] offers implicit recognition of this point.

The international conflict on the existence of the fair opportunity doctrine presents an even stronger justification for this Court's review. The United States ratified the Hague Rules primarily to provide a uniform international law for bills of lading. When U.S. courts create judicial doctrines in conflict with the interpretation given to the treaty in every other contracting state, they undermine the very purpose of the uniform law treaty. The problems of intercircuit conflicts are magnified at the international level. Even if it were possible to predict where litigation would occur, the difficulty and expense of monitoring treaty interpretations throughout the world is far greater than for monitoring variations among the circuits. And the threat of forum shopping becomes even more daunting when practiced on an international scale. It is no surprise that this Court has recognized the importance of seeking international uniformity in the analogous context of the carriage of goods by air. *See, e.g., Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 256 (1984) (stressing

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[9] The issue in *Sky Reefer* is whether a consignee is bound by a foreign arbitration clause in a bill of lading subject to COGSA. The *Sky Reefer* petition focuses on the effect of COGSA section 3(8), but the district court's decision to enforce the arbitration clause implicitly relied on the conclusion that a party who does not receive the bill of lading until well after the goods have been shipped is nevertheless bound by its terms; otherwise the consignee would not have been bound by the arbitration clause. If this Court affirms the decision of the First Circuit, it may address this point in a manner that could be of guidance to the Eighth Circuit. Although we urge the Court to grant certiorari in the present case now, the Court may also wish to consider holding this petition until it has decided *Sky Reefer*.

the Warsaw Convention's objective of international uniformity). The need for the Court's intervention is every bit as compelling in this context.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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